Supreme Court, U.S.
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OCT 28 1992
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92-803

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER, 1992

WILLIAM R. SPEACHT,
Petitioner,

v.

MOBIL CHEMICAL COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEAL FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

The questions presented by this petition are:

(1) Whether the Plaintiff in a constructive discharge action bears the burden of proving at trial the accrual of the limitations period for filing an administrative charge of age discrimination.

(2) Whether a jury finding that the Plaintiff knew or should have known of the ongoing discrimination which resulted in his constructive discharge for more than 300 days before he filed on administrative charge of age discrimination is sufficient to establish a limitations bar, when a related act of discrimination occurs less than 300 days before the charge was filed.

LIST OF PARTIES

The parties to the proceedings below were the petitioner, plaintiff below, WILLIAM R. SPEACHT, and the respondents, MOBIL CHEMICAL COMPANY INC. and MOBIL OIL CORPORATION, the defendants below.

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NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES
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WILLIAM R. SPEACHT,
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v.

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PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEAL
FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

The Petitioner, WILLIAM R. SPEACHT, respectfully prays that a Writ of Certiorari issue to review the Opinion and Judgment of the United States Court of Appeals for the Eleventh Circuit entered in the above-entitled proceeding on July 30, 1992.

OPINIONS BELOW

The Order of the Court of Appeals for the Eleventh Circuit denying the Petition for Rehearing with Suggestion for Rehearing En Banc has not been reported and is reprinted in the Appendix hereto, (A: P.A-5, infra).

The Opinion of the Court of Appeals for the Eleventh Circuit is not reported and is reprinted in the Appendix hereto, (A: P.A-3, infra).

The Final Judgment of the United States District Court for the Middle District of Florida (Restani, D.J.) has not been reported. It is reprinted in the Appendix hereto, (A: P.A-1, infra).

JURISDICTION

This action was removed to the United States District Court for the Middle District of Florida from the Circuit

Court, Fourth Judicial Circuit, in and for Duval County, Florida, on October 26, 1988. The removal was effected pursuant to 28 U.S.C. §1331 and 28 U.S.C. §1337 as well as 28 U.S.C. §1332. On April 8, 1991, the District Court entered judgment in favor of the Respondent, based upon a jury verdict entered April 8, 1991.

On Petitioner's appeal, the Eleventh Circuit on June 1, 1992, entered an Opinion affirming the District Court's Order. Petitioner filed a Petition for Rehearing with Suggestion for Rehearing En Banc which was denied on July 30, 1992. The jurisdiction of this Court to review the judgment of the Eleventh Circuit is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

29 U.S.C. §626(d) provides:

> No civil action may be commenced by an individual under this section

> until 60 days after a charge alleging unlawful discrimination has been filed with the Secretary. Such a charge shall be filed--
>
> (1) within 180 days after the alleged unlawful practice occurred; or
>
> (2) in a case to which section 14(b) [29 USCS §633(b)] applies, within 300 days after the alleged unlawful practice occurred, or within 30 days after receipt by the individual of notice of termination of proceedings under State law, whichever is earlier.

Fed.R.Civ. P.8(c) provides, in pertinent part:

> In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense.

STATEMENT OF THE CASE

The Petitioner, WILLIAM R. SPEACHT, was born on October 14, 1927. In 1986,

MR. SPEACHT had been employed for 13 years as a Sales Representative for Respondent, MOBIL CHEMICAL COMPANY.

MR. SPEACHT had rheumatic fever as a child, which left him with a diseased heart. In 1982, he had a mitral valve replacement. He recovered fully and had no physical disability in 1985. MR. SPEACHT had blood pressure problems in the spring of 1986 and side effects from the blood pressure medication.

MR. SPEACHT was placed on short-term disability the first time in July, 1986, and returned to work on September 9, 1986. On October 13, 1986, MR. SPEACHT was again placed on short-term disability. On December 12, 1986, MR. SPEACHT received a release to return to duty from MOBIL CHEMICAL COMPANY'S doctor.

On that same day, December 12, 1986,

MR. SPEACHT had a meeting with his supervisors, about his annual appraisal. The Respondent gave MR. SPEACHT the first unsatisfactory rating he had received in 29 years of sales. MR. SPEACHT was given a set of short-term objectives ostensibly designed to improve his performance.

The Petitioner went back on short-term disability for a third time on December 14, 1986. He remained in that status until his short-term disability was converted to long-term disability on September 15, 1987.

In early January, 1987, the Respondent eliminated the positions of 3 of MR. SPEACHT'S fellow salesmen. Each of the men who were discharged were 50 or older.

On September 1, 1987, the Petitioner met with company representatives to

discuss the change of his status from short-term disability leave to long-term disability leave. MR. SPEACHT inquired whether any other jobs were available for him. The response was negative. MR. SPEACHT repeated his question regarding the availability of any other position by letter dated September 4, 1987. When MR. SPEACHT was placed on long-term disability on September 15, 1987, he was classified as a retiree.

MR. SPEACHT filed his administrative charge of age discrimination with the Equal Employment Opportunity Commission on January 20, 1988.

On September 28, 1988, MR. SPEACHT filed suit against the Respondents, alleging that he was constructively discharged in violation of the ADEA. Numerous incidents of discrimination

harassment were alleged and proved. The Answer was filed on November 22, 1988, and the Respondent's Fourth Affirmative Defense set forth a claim that MR. SPEACHT'S administrative charge had not been filed timely.

The initial trial in this action began on March 8, 1990. The Respondent did not request a jury instruction on the charge-filing issue. Accordingly, the trial judge for the initial jury trial did not instruct the jury on that issue. The initial trial ended with a hung jury, and the court declared a mistrial.

The second trial in this action commenced on April 2, 1991.

The Respondent again did not request an instruction with regard to the timely filing of the EEOC charge.

Shortly before the close of the

Respondent's case, the trial court, who was not the judge who presided over the first trial, held a charge conference. At that time, the judge, sua sponte, suggested the need for an instruction on the charge-filing issue. On this issue the district court stated:

> "My concern is statute of limitations. I think there is [a] material issue of fact here. The cases are that it's not the day he actually leaves employment, it's the day he knew he was going to be forced to leave employment so that's what I'm going to ask the jury to decide...."

The trial court composed its own instruction on the issue and, over objection, read the following instruction:

> Now, if you find that the plaintiff has failed to prove any one of these elements your verdict must be in favor of the defendant and you will go no further in your deliberations.
>
> As indicated, the wrongful act alleged by plaintiff is a

decision by defendant to force him onto long-term disability because of his age. If you find that defendant committed this wrongful act, you must decide when plaintiff knew or should have known, using a reasonable amount of diligence, of this wrongful act. We will ask you to provide us with the date plaintiff obtained or should have obtained this knowledge. On this point you may wish to consider that plaintiff received a performance review set of objectives on December 12, 1986, and that he had met with Mr. Thompson and Ms. Marszalkowski on September 1st, 1987, prior to beginning long-term disability on September 15th, 1987. You may also consider any testimony, correspondence, conversations or any evidence which you believe indicates when plaintiff knew or should have known of the wrongful act.

If you find the plaintiff has proved each element you must also address the question of the defendant's affirmative defense. Defendant contends that regardless of anything else to the contrary it would have terminated the plaintiff for good and sufficient reasons, i.e. the nonperformance of or inability of plaintiff to perform his job.

> Since this is an affirmative defense the burden of proof by a preponderance of the evidence is on the defendant to prove this defense. If the defendant carries the burden of proof you must find in favor of the defendant, but if the defendant fails to carry his burden of proof on this defense then you must continue in your deliberations and address the issue of damages.

The trial judge also composed an interrogatory on the timeliness question and included it in the verdict form. The verdict form, as completed by the jury, appeared as follows:

VERDICT

We, the undersigned Jurors, duly drawn, empaneled and sworn to try the above-entitled action, find as follows:

1. Is plaintiff entitled to recover for age discrimination? (check one)

Yes	No
X	

If your answer is "no", do not answer any further questions. If your answer is "yes", continue to answer questions 2-4.

2. Enter the date plaintiff knew or should have known of the age discrimination you found. (enter date)

12/12/86

3. What is the amount of back pay and benefits plaintiff is to recover on account of the age discrimination you have found? (fill in blank)

201,803.24

4. Did the defendant willfully violate the law when it constructively discharged plaintiff? (check one)

Yes	No
X	

On the basis of the jury's determination that the Petitioner knew or should have known of the age discrimination on December 12, 1986, which was more than 300 days before the EEOC charge was filed, the trial court entered judgment on behalf of the Respondents.

On appeal, the Petitioner argued, inter alia, that the jury instruction on the charge-filing issue was misleading,

inadequate, and prejudicial. The Petitioner argued that the instruction improperly shifted the burden of proff on the timeliness issue, and that the evidence was insufficient to support the imposition of the limitations bar.

The United States Court of Appeals for the Eleventh Circuit affirmed without opinion on June 1, 1992. The Petitioner timely filed his Petition for Rehearing and Rehearing En Banc, which was denied on July 30, 1992.

ARGUMENT

The jury instruction formulated by the trial judge at its own instance improperly shifted to the plaintiff (Petitioner here) the burden of proving compliance with the limitations period for filing an administrative charge of age discrimination. That error, coupled with

the assignment of an incorrect standard of proof to carry the burden, resulted in a judgment by the trial court in favor the Respondent, despite the jury's finding of willful age discrimination in the Petitioner's constructive discharge. It is highly likely that a properly instructed jury would have found in favor of the Petitioner as to the limitations issue.

The instruction is divisible into two parts. The first is the end of the instructions describing elements of the Petitioner's burden of proof. At the very end of that section, the instruction addresses the limitations issue. Immediately thereafter, the instruction begins to describe the Respondent's burdens. The placement of the instruction leads inevitably to the conclusion that

the limitations issue was part of the Petitioner's case. The instruction then identifies the Respondent's single affirmative defense to be its claim that, discrimination aside, the Petitioner would have been fired for poor job performance anyway. The statement that the Respondent had a single affirmative defense, and that it was not the limitations question, necessarily implied that the limitations issue was for the Petitioner to prove.

The proceedings in this case underscore the wisdom of the rule that, generally, it is error for a trial judge to raise sua sponte a limitations defense (or any other affirmative defense), particularly at trial. See, e.g., Wagner v. Fawcett Publications, 307 F.2d 409, 412 (7th Cir. 1962); Davis v. Bryan, 810 F.2d 42, 45 (2d Cir. 1987); Banks v. Chesapeake

and Potomac Telephone Co., 802 F.2d 1416, 1427 (D.C. Cir. 1986); Haskell v. Washington Township, 864 F.2d 1266, 1273 (6th Cir. 1988). At both trials, the Respondent failed to request that the issue be submitted to the jury. There may have been sound, tactical reasons for this choice, such as a desire to avoid the implication that the discrimination did, in fact, occur. Bradford-White Corp. v. Ernst & Whinney, 872 F.2d 1153, 1160-61 (3d Cir. 1989). Because of the Respondent's waiver of the issue, it is apparent that neither party was prepared to debate the pertinent law, which resulted in the trial court applying an inaccurate standard.

Clearly, rather than the "know or should have known of the discrimination" standard, the limitations period for a

constructive discharge based upon a continuing pattern of harassment accrues when the discriminatory conduct ends. If any acts of age-based harassment occurred within 300 days of the filing of the charge, then the charge was timely. See, Havens Realy Corp. v. Coleman, 455 U.S. 363, 380-81 (1982); Hendrix v. City of Yazoo City, Miss., 911 F.2d 1102, 1103-04 (5th Cir. 1990); Haithcock v. Frank, 958 F.2d 671,677-79 (6th Cir. 1992); Davidson v. Indiana-American Water Works, 953 F.2d 1058, 1059-60 (7th Cir. 1992). Clearly, at least one incident occurred within the limitations period--the September 1, 1987 refusal of the Respondent to offer the Petitioner any other position, as he went on long-term disability. Had the jury been properly instructed, it is highly likely that the limitations problem would

not have developed at all.

In any event, the jury's finding is insufficient to support the court's decision to implement the limitations bar. It the burden rests with the defendant to show an untimely filing, it failed to do so. There simply was no finding that the charge was filed more than 300 days after the last act of discriminatory conduct, and thus the defense was not established. The issue, then, is whether that burden of proof properly belonged to the Respondent.

Since this Court's decision in Zipes v. Trans World Airlines, Inc., 455 U.S. 385 (1982), it has been established law that the period for filing an administrative charge of employment discrimination is not jurisdictional, but is more akin to a statute of limitations. The charge-filing period is therefore

subject to the doctrines of waiver, estoppel, and tolling. Id. at 394.

In addition to Zipes, the Court has provided direction for the calculation of the charge-filing period in other decisions. See, Delaware State College v. Ricks, 449 U.S. 250 (1980); Chardon v. Fernandez, 454 U.S. 6 (1982). See also, Irwin v. Veterans Administration, 498 U.S. ___, 111 S.Ct. 453, 112 L.Ed.2d 435 (1990). (Time period for filing employment discrimination action against federal government is subject to equitable tolling). However, the Court has not directly addressed the burden of proof issue. The question of the assignment of the burden of proving at trial the plaintiff's compliance with, or violation of, the charge-filing limitations period remains an unsettled issue, and the

circuit courts of appeal are in conflict as to the proper rule.

The rule set forth in Ricks and Chardon is that the time for filing a charge with the EEOC begins to run when the employee becomes aware of the discriminatory act. Ricks, 449 U.S. at 259; Chardon, 454 U.S. at 8. Furthermore, under Ricks, it appears that if a complaint, on its face, shows that it was filed outside the limitations period, as measured from the relevant incidents alleged in the complaint, the complaint is subject to dismissal.

These precepts are easily applied in cases in which the discriminatory act took place at a discrete, clearly-identifiable point in time, and in cases in which the plaintiff was explicitly placed on notice of the discriminatory act at a specific

time. In such cases, burden of proof questions will likely have no significance.

However, constructive discharge is a particularly nebulous area in terms of specifying a single date upon which the discriminatory conduct occurred for purposes of the limitations period for filing an administrative charge. Typically, this form of unlawful conduct develops over a period of time, rather than taking place at one identifiable point in time. In these cases, the process of the identifying the key date that triggers the running of the statute of limitations is difficult, at best.

The primary issue in this petition addresses only a part of that process. who should bear the burden of proving when the limitations period accrued? Which

party should be saddled with the duty to analyze the various pre-discharge incidents and to prove its conclusions to jury? Should that task fall to the plaintiff, who directly experienced the situation but who played no part in creating the circumstances surrounding the issue? Or should the burden of proving a limitations problem be borne by the defendant, as the party responsible for the circumstances?

There is a clear conflict among the federal circuits on this question. The courts of appeal have divided into two seemingly-unreconcilable schools of thought. One school places the burden of proving timely filing on the plaintiff, and the other school looks to the defendant to demonstrate a violation of the limitations period, just as the

defendant must prove any affirmative defense.

The statute of limitations has been designated as an affirmative defense. Fed.R.Civ.P.8(c). This Court has observed that "we should regard the plea of limitations as a 'meritorious defense, in itself serving a public interest'". United States v. Kubrick, 444 U.S. 111, 117 (1979), quoting, Guaranty Trust Co. v. United States, 304 U.S. 126, 136 (1938). The statute of limitations is "a defense separate from the denial of a breach of duty". Kubrick, 444 U.S. at 125.

In addition, numerous courts have held that a claimed violation of the statute of limitations is an affirmative defense, which must be pleaded by the defendant, and which is waived if not timely raised. See, e.g., Wade v. Orange

County Sheriff's Office, 844 F.2d 951, 955 (2d Cir. 1988); Bradford-White Corp. v. Ernst & Whinney, 872 F.2d 1153, 1160-61 (3d Cir. 1989); Hernandez v. Hill Country Telephone Co-Op, Inc., 849 F.2d 139, 142 (5th Cir. 1988); Haskell v. Washington Township, 864 F.2d 1266, 1273 (6th Cir. 1988); Heiar v. Crawford County, Wis., 746 F.2d 1190, 1196-97 (7th Cir. 1984); Schmidt v. United States, 933 F.2d 639, 640 (8th Cir. 1991); Roberts v. College of the Desert, 870 F.2d 1411, 1414 (9th Cir. 1988); Hodgson v. Humphries, 454 F.2d, 1279, 1284 (10th Cir. 1982); Weaver v. Casa Gallardo, Inc., 922 F.2d 1515, 1521 (11th Cir. 1991); and Banks v. Chesapeake and Potomac Telephone Co., 802 F.2d 1416, 1427 (D.C. Cir. 1986).

These decisions clearly place the burden of proving this affirmative defense

on the defendant. If the issue is not raised by the defendant at trial, these decisions hold that the defense, like any other except jurisdiction, is waived altogether. This line of cases should control the result here. The Respondent did not raise a timeliness issue at all during the first trial of this action. Consistently, at the second trial, the Respondent did not request a jury instruction on timeliness of the charge. The defense should have been deemed waived. The trial court erred in raising the issue, sua sponte. The court erred further in formulating its own jury instruction which effectively placed upon the petitioner the burden of proving that his charge had been timely.

On appeal, the Eleventh Circuit rejected without opinion the petitioner's

burden shifting argument. That result is consistent with recent Eleventh Circuit rulings that the burden rests on the plaintiff to show that the charge was filed in a timely fashion. See, e.g., Lampliter Dinner Theater v. Liberty Mutual Insurance Co., 792 F.2d 1036, 1043 (11th Cir. 1986); Grant v. Preferred Research, Inc., 885 F.2d 795, 799 (11th Cir. 1989). These decisions represent a separate and distinct approach to the issue of the burden of proving timeliness of the charge, and are in direct conflict with the cases cited previously, including the Eleventh Circuit's own holding in Weaver v. Casa Gallardo, Inc.

The Eleventh Circuit is joined by the Fifth Circuit in explicitly assigning to the plaintiff the burden of proof. See, e.g., Emmons v. Southern Pacific

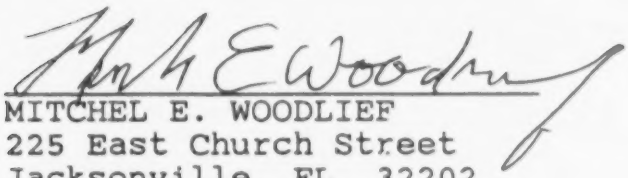
Transportation Co., 701 F.2d 1112, 1117-18 (5th Cir. 1983). The Fifth Circuit is also like the Eleventh Circuit in that there is a conflict among its own decisions. See, Hernandez v. Hill Country Telephone Co-Op, Inc., 849 F.2d 139, 142 (5th Cir. 1988). The First Circuit aligns itself with Fifth and Eleventh Circuits in assigning the burden to the plaintiff. See, Tagliente v. Himmer, 949 F.2d 1,5 (1st Cir. 1991).

CONCLUSION

There is a clear conflict among the circuits on the burden of proof issue. Because this is a procedural question of considerable importance to the conduct of any civil trial which involves a limitations claim, this Court should grant certiorari in this case to establish a coherent rule that can be applied

uniformly by the trial courts.

Respectfully submitted,



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UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA

WILLIAM R. SPEACHT,
Plaintiff,

v. Case No.: 88-884-CIV-J-12

MOBIL CHEMICAL COMPANY,
Defendant.
_____/

JUDGMENT IN A CIVIL CASE

XX **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUGED that the jury having found that the Plaintiff in this cause knew or should have known of the age discrimination as of December 12, 1986, the Court hereby enters judgment in

favor of the Defendant, in that the Plaintiff's charge of age discrimination to the Equal Employment Opportunity Commission was untimely filed.

April 8, 1991

/s/ Jane A. Restani

JANE A. RESTANI
UNITED STATES DISTRICT JUDGE
(By Designation)

c:

Counsel of Record

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 91-3421
Non-Argument Calendar

(D. C. Docket No. 88-884-CIV-J-12)

WILLIAM R. SPEACHT,

Plaintiff-Appellant,

versus

MOBILE CHEMICAL COMPANY, a
division of Mobil Oil Corporation,
a New York Corporation,

Defendant-Appellee.

Appeal from the United States
District Court
for the Middle District of Florida

(June 1, 1992)

Before DUBINA, Circuit Judge, HILL and

CLARK*, Senior Circuit Judges.

PER CURIAM:

AFFIRMED. See 11th Cir. R. 36-1.

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*See Rule 34-2 (b), Rules of the U.S. Court of Appeals for the Eleventh Circuit.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 91-3421

WILLIAM R. SPEACHT,

Plaintiff-Appellant,

versus

MOBIL CHEMICAL COMPANY,
a Division of Mobil Oil Corporation,
a New York Corporation,

Defendant-Appellee.

On Appeal from the United States District Court for the Middle District of Florida

---

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC

Before: DUBINA, Circuit Judge, HILL and CLARK*, Senior Circuit Judges.

PER CURIAM:

(X) The Petition(s) for Rehearing are

DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

( ) The Petition(s) for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the

reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Joel Dubina
UNITED STATES CIRCUIT JUDGE

*See Rule 34-2(b), Rules of the U.S. Court of Appeals for the Eleventh Circuit.

ORD-42
(9/91)

PLAINTIFF'S PROPOSED JURY INSTRUCTION
NO. 28
STATUTE OF LIMITATIONS DEFENSE

There is an issue in this case arising from a defense asserted by the Defendant and is based upon what is called the Statute of Limitations. This simply is a provision of the law requiring that a discrimination claim be commenced within a prescribed period of time, otherwise the suit is barred or precluded.

In a case like this one the time limit placed upon the Plaintiff began to run when the Plaintiff knew, or by the exercise of reasonable care should have known, that his position as a Sales Representative for the Defendant was being terminated.

In the instance, the applicable limitation period is 300 days, and the Defendant claims that the suit is barred

because the Plaintiff knew, or by the exercise of reasonable care should have known more than 89 days before the filing of the claim on January 20, 1988 that his position as a Sales Representative for the Defendant was being terminated.

As to this issue you are instructed that the Defendant has the burden of proof by preponderance of the evidence.

With regard to the Plaintiff's knowledge, you are instructed that the means of knowledge are ordinarily equivalent in law to knowledge. So, if it appears from a preponderance of the evidence in the case that the Plaintiff had information which would normally have lead a reasonably careful person of the same age, mental capacity, intelligence, training and experience to make inquiry through which he would surely learned

certain facts, then the Plaintiff may be found to have had actual knowledge of those facts, the same as if he had made such inquiry and had actually learned such facts.

Pat. Jury Instruction-5th Cir. 1983 Ed.
Special Instruction No. 5
Hamilton v. 1st Source Bank, 58 U.S.L.W. 2453 (4th Cir. Feb. 5, 1990)

Given: _____

Modified: _____

Refused: _____

Withdrawn: _____

... defendant are not pretexts you may still find that the plaintiff was discharged because of his age if one factor in the decision to discharge was age and it, in fact, made a difference in the decision to discharge plaintiff.

Now, if you find that the plaintiff has failed to prove any one of these elements your verdict must be in favor of the defendant and you will go no further in your deliberations.

As indicated, the wrongful act alleged by plaintiff is a decision by defendant to force him onto long-term disability because of his age. If you find that defendant committed this wrongful act, you must decide when plaintiff knew or should have know, using a reasonable amount of diligence, of this

wrongful act. We will ask you to provide us with the date plaintiff obtained or should have obtained this knowledge. On this point you may wish to consider that plaintiff received a performance review set of objectives on December 12, 1986, and that he had met with Mr. Thompson and Ms. Marszalkowski on September 1st, 1987, prior to beginning long-term disability on September 15th, 1987. You may also consider any testimony, correspondence, conversations or any evidence which you believe indicates when plaintiff knew or should have known of the wrongful act.

If you find the plaintiff has proved each element you must also address the question of the defendant's affirmative defense. Defendant contends that regardless of anything else to the contrary it would have terminated the

plaintiff for good and sufficient reasons, i.e. the nonperformance of or inability of plaintiff to perform his job.

Since this is an affirmative defense the burden of proof by a preponderance of the evidence is on the defendant to prove this defense. If the defendant carries the burden of proof you must find in favor of the defendant but if the defendant fails to carry his burden of proof on this defense then you must continue in your deliberations and address the issue of damages.

As you see, we are winding down now. We've gotten to the issue of damages.

Members of the jury, you should remember that even though I am instructing you on damages such an instruction is no indication as to what you should determine -- as to what your determination should be

on other issues.

If you have found that the defendant did discharge plaintiff and that the defendant did discriminate against plaintiff in violation of the law...